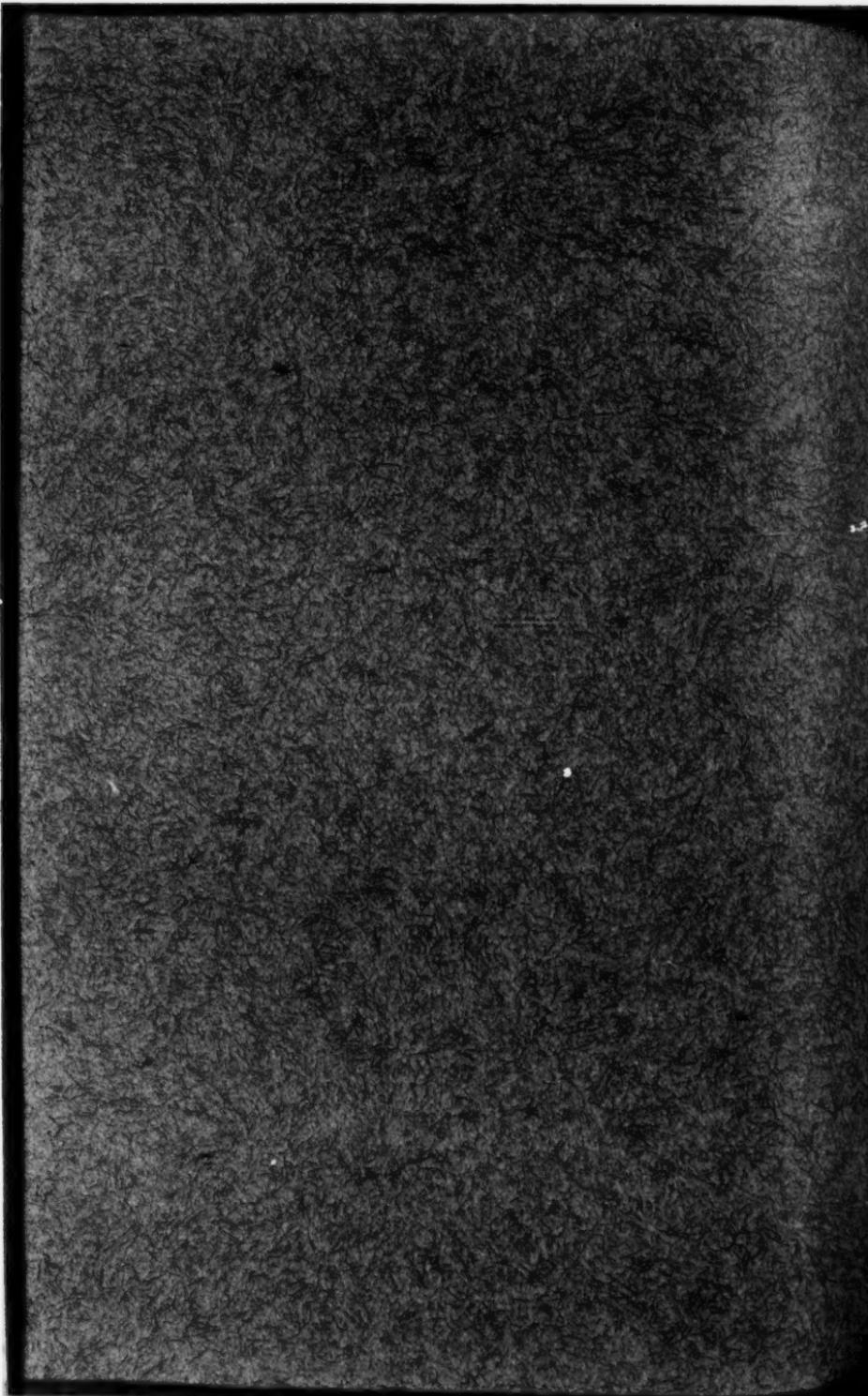




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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 842

JAMES O. GREENAN AND EDITH GREENAN,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The Tax Court of the United States did not write an opinion. The opinion of the Circuit Court of Appeals (R. 65-67) is reported at 145 F. 2d 134.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 16, 1944. (R. 68.) The petition for certiorari was filed January 15, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

3
Whether the court below erred in affirming the Tax Court's dismissal of the proceeding in so far as it related to taxpayer Edith Greenan on the ground that she had not signed or verified the petition and had not made herself a party to the proceeding.

STATUTES AND RULE INVOLVED

The relevant portions of the Internal Revenue Code and of Rule 6 of the Rules of Practice of the Tax Court are set forth in the Appendix, *infra*, pp. 14-16.

STATEMENT

The Commissioner determined deficiencies in income tax against taxpayers for the calendar years 1935, 1936 and 1938, when they were husband and wife, and also penalties for failure to file returns for 1935 and 1936. (R. 25-38.) On May 7, 1943, duplicate originals of the deficiency notice were sent separately to each of the two taxpayers, who had been divorced in 1941 and had established separate residences. (R. 8, 25, 27.)¹

A petition for redetermination of the 1936 and 1938 deficiencies and 1936 penalty was filed with

¹ The Commissioner's deficiency letter states that "duplicate originals of the joint notice of deficiency is sent to each spouse" (R. 27), but does not show that, as the Commissioner has advised us, Edith Greenan's notice was sent to her at Carmel, California, where she now resides (R. 3).

the Tax Court on July 17, 1943. (R. 1.) The petition (R. 2-24) contained the names of both taxpayers in its caption (R. 2) and commenced with the statement that (R. 2-3):

The above named petitioners, James O. Greenan and Edith Greenan, hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated May 7, 1943 * * * and as a basis and in support of their proceeding, allege as follows:

* * * * *

Paragraphs I to IV, inclusive, set forth taxpayers' addresses, jurisdictional facts, taxes involved, and assignment of errors. (R. 3-7.) Paragraph V (4), (5) and (6), purporting to contain general facts applicable to all assignments of error (R. 7), alleged (R. 8):

4. Petitioner Edith Greenan at all times stated herein was the wife of James O. Greenan, residing with him. That said parties were divorced on the 10th day of February, 1941 and that status still continues.
5. That Petitioner Edith Greenan has no knowledge of or concerning the matters and things herein alleged or of or concerning the alleged deficiency income tax the subject hereof.
6. That hereinafter the word "petitioner" will be deemed to refer only to the

petitioner James O. Greenan unless the contrary affirmatively appear.

Thereafter, the petition repeatedly referred to the "petitioner" (R. 11-23), meaning James O. Greenan, and concluded as follows: (R. 23):

Wherefore, petitioner prays that this court hear and determine these proceedings, and upon hearing and upon the evidence adduced thereat this court find and determine that there is no deficiency in Federal Income Tax payable by the petitioner for the calendar years 1936 and 1938, and that the court grant to petitioner such other or further relief as may be meet and proper in the premises.

GEO. B. THATCHER,
Counsel for Petitioner.

Address:

206 North Virginia Street
Reno, Nevada [*sic*]

The petition was verified as follows (R. 24):

STATE OF NEVADA,
County of Washoe—ss.

James O. Greenan, being first duly sworn, deposes and says: That he is one of the petitioners above named; that he makes this verification on his own behalf and on behalf of Edith Greenan, copetitioner; that Edith Greenan has no knowledge of or concerning the matters and things involved herein; that he has read the foregoing petition and is familiar with the statements and facts

alleged therein; that the same are true of his own knowledge except as to matters therein stated on information and belief and as to such matter he believes it to be true.

JAMES O. GREENAN.

Subscribed and sworn to before me this
10th day of July, 1934.

[SEAL] AUDREY ANNETT,
Notary Public in and for the County
of Washoe, State of Nevada.

My Commission Expires May 29, 1947.

On August 10, 1943, the Commissioner simultaneously filed an answer to the petition (R. 42-46) and a motion to dismiss as to Edith Greenan because she appeared to have no interest in the proceeding and had not signed or verified the petition (R. 46-47). A hearing on the motion was held on September 22, 1943, and on September 24, 1943, the Tax Court entered an order granting the motion and dismissing the proceeding for lack of jurisdiction in so far as it related to Edith Greenan. (R. 49.) Taxpayers filed a joint petition for review of this order by the Circuit Court of Appeals for the Ninth Circuit (R. 50-53)² and that court subsequently affirmed the action of the Tax Court (R. 65-68).

² A stipulation designating the Circuit Court of Appeals for the Ninth Circuit as the reviewing court was entered into by the parties on December 7, 1943, pursuant to Section 1141 of the Internal Revenue Code (26 U. S. C., See. 1141).

ARGUMENT

The issue involved in this case was correctly decided below, is not a subject of conflict among circuit courts of appeals, and is not, we submit, of sufficient general importance to warrant granting the petition for a writ of certiorari. It involves the questions (1) whether, in this case, taxpayer Edith Greenan had filed a petition for redetermination of a deficiency within the meaning of Section 272 of the Internal Revenue Code (Appendix, *infra*, pp. 14-15), which requires that the petition be that of the "taxpayer"; (2) whether the signature and verification of the petition for redetermination were sufficient as to Edith Greenan under the rules of the Tax Court, adopted pursuant to Section 1111 of the Internal Revenue Code (Appendix, *infra*, p. 15); (3) whether the verification of the petition by taxpayer James O. Greenan for himself and Edith Greenan and its signature by "Counsel for Petitioner" were sufficient to make Edith Greenan a party by reason of the fact that the Commissioner made joint deficiency determinations against the taxpayers.

1. The petition is signed by counsel for taxpayer James O. Greenan only, designated as counsel for "Petitioner" (R. 23) who, according to the allegations of the petition (R. 8), is James O. Greenan. The petition also prays for relief to

"petitioner" (James O. Greenan) and alleges that James O. Greenan and Edith Greenan were divorced in 1941 and that Edith Greenan has no knowledge of or concerning the matters and things alleged or of or concerning "the alleged deficiency income tax the subject hereof." (R. 8.) Hence, as the court below stated (R. 67), the petition "does not even purport to be the petition of Edith Greenan"; and this is so even though her name is included in the caption, and the opening paragraphs of the petition (R. 2-7) refer to the "petitioners." If the petition was intended to be that of Edith Greenan as well as that of James O. Greenan, it is only reasonable to conclude that steps would have been taken to remedy its defects, at least after the Commissioner called attention to them by filing his motion to dismiss. Leave of the Tax Court or consent of the Commissioner to an amendment of the petition might have been sought any time during the period of approximately 45 days before the motion was heard, as well as thereafter.² No such request was made, however. Since the jurisdiction of the Tax Court depends

² Rule 17 of the Rules of Practice before the Tax Court provides:

The petitioner may, as of course, amend his petition at any time before answer is filed. After answer is filed, a petition may be amended only by consent of the Commissioner or on leave of the Court.

upon the filing of a petition by "the taxpayer"⁴ (Section 272 (a) (1), (e) Internal Revenue Code, Appendix, *infra*, pp. 14-15) and the petition filed in this case was not that of Edith Greenan, the Tax Court rightly held that it had no jurisdiction of the proceeding as to her. Even if a contrary conclusion as to the petition was possible, it was not an abuse of discretion so to hold, and the decision was rightly sustained below.

2. Taxpayer argues (Br. 13-21) that the verification of a petition is in itself a merely formal matter, not going to the jurisdiction. However, Rule 6 (h) of the Rules of Practice before the Tax Court (Appendix, *infra*, pp. 15-16) requires that the petition be verified "by the petitioner" except where the taxpayer is outside the United States; and the court is empowered to enforce its rules. The decisions which taxpayers cite (Br. 14-18) stress the discretion of the Board (Tax Court) in regard to matters of procedure before it. See *Continental Petroleum Co. v. United States*, 87 F. 2d 91 (C. C. A. 10), quoted in petitioners' brief, p. 16, and *Baldwin v. Commissioner*, 94 F. 2d 355 (C. C. A. 9), quoted at p. 17 of their brief. In the former case the Board of Tax Appeals (Tax

⁴ Section 3797 (a) (14) of the Internal Revenue Code (26 U. S. C., Sec. 3797) defines the term "taxpayer" as "any person subject to a tax imposed by this title."

Court) had regarded the petition as valid, notwithstanding formal defects, and was sustained in doing so. There was no question that the petitions were those of the parties concerned. Here, the petition not only was improperly verified but prayed for relief to James O. Greenan only and was signed by counsel only on his behalf. There is nothing in the petition to indicate that counsel would have had authority to sign the petition for Edith Greenan or that James O. Greenan had authority to execute the purported verification in her behalf. Consequently the Tax Court proceeded within its discretion and not in conflict with its own past decisions in sustaining the motion to dismiss; for the defects in execution were serious, involving the identity of the parties as well as important matters of form.

The filing of the motion to dismiss by the Commissioner simultaneously with his answer clearly negated, as the court below held (R. 67), any waiver which might have resulted from the answer alone even if, contrary to our contention, all of the defects in the petition were such as could be waived. Since the cause would proceed upon the merits in regard to petitioner James O. Greenan in any event, there was adequate reason for filing the motion and answer together. The Tax Court was not precluded from giving

effect to its view with regard to the sufficiency of the petition by the pleadings which the Commissioner filed.

3. Taxpayers' argument that, because husband and wife making a joint return may be treated as a "taxable unit" and because an obligor is entitled to insist that his co-obligor join with him in any assertion of right or defense of liability, the taxpayers are to be treated as one in this proceeding (Br. 25), is unsound as applied to this case. The taxpayers did not file joint returns and are not joint obligors for the asserted tax deficiencies. The petition contests the deficiency determinations of the Commissioner for the calendar years 1936 and 1938 as to tax liability on capital gains from the disposition of shares of stock received by James O. Greenan as compensation for services while he and Edith Greenan were married and residing in the Philippine Islands. (R. 4-38.) Neither taxpayer filed an income tax return for 1936. A return was filed for 1938 which, although the record does not disclose the fact in the matter, was actually signed by James O. Greenan only and accordingly was not a joint return.

The 1938 deficiency assessment (R. 31-33) is based upon the return filed by James O. Greenan for that year and he, if anyone, is primarily liable for the tax involved and also for the 1936

deficiency. In the absence of joint returns,⁵ the earnings and the liability are attributable to Edith Greenan only severally and in part, if at all, by virtue of community property laws.⁶ The Commissioner's sending of a joint notice of deficiencies did not work a change in this regard, for such a notice is contemplated by the statute (Internal Revenue Code, Sec. 272 (a) (1), Appendix, *infra*, p. 14) only in case a joint return has been filed. James O. Greenan's individual tax liability will be determined in the proceeding

⁵ If taxpayers had filed joint returns for 1938 their liability for 1938 would be joint and several pursuant to Section 51 (b) of the Revenue Act of 1938, c. 289, 52 Stat. 447. The nature of their liability for 1936, if they had filed a joint return, is not entirely clear. The Revenue Act of 1936 did not contain a provision respecting liability in such cases. By the decisions of several circuits, the wife is liable for tax only on her individual income. *Cole v. Commissioner*, 81 F. 2d 485 (C. C. A. 9th); *Crowe v. Commissioner*, 86 F. 2d 796 (C. C. A. 7th); *Commissioner v. Rabenold*, 108 F. 2d 639 (C. C. A. 2d); *Commissioner v. Uniacke*, 132 F. 2d 781 (C. C. A. 2d). It was held in some cases, however, that the liability was joint and several. *Rogers v. Commissioner*, 111 F. 2d 987 (C. C. A. 6th); *Moore v. United States*, 37 F. Supp. 136 (C. Cls.). Cf. *Helvering v. Janney*, 311 U. S. 189; *Taft v. Helvering*, 311 U. S. 195. The matter is now settled by Section 51 (b) of the Internal Revenue Code, 26 U. S. C., Sec. 51 (b), which renders the liability joint and several for taxable years beginning with 1939.

⁶ The parties were apparently domiciled in Nevada during the taxable years and the income in question was earned in the Philippine Islands. Community property laws apply in both Nevada and the Philippine Islands.

before the Tax Court, and Edith Greenan need not be a party to the proceeding. If the Commissioner should collect any portion of the deficiencies from her either before or after the termination of the proceeding, she will have her remedy in the form of a suit for refund. There is, accordingly, nothing in the nature of the taxpayers' liability or of the proceeding itself which renders improper the dismissal by the Tax Court as to Edith Greenan. The decision below, affirming the action of that court, was correct.

* * * * *

As the court below pointed out (R. 67), the justification for a dismissal in this case is stronger than in *Schwartz v. Commissioner*, 40 F. 2d 956 (C. C. A. 9), which presented somewhat similar facts. A petition for certiorari was granted in that case (322 U. S. 724) but was dismissed October 2, 1944, pursuant to stipulation of counsel. In that case the wife, Marie Schwartz, had not signed or verified an original petition for redetermination. Following the Commissioner's motion to dismiss, an amended petition was filed but, as the Circuit Court of Appeals found, was improperly verified in behalf of the wife. There was no question in that case that the petition was in substance that of both parties. The Tax Court's dismissal as to the wife was nevertheless sustained in the Circuit Court of Appeals.

CONCLUSION

The case was correctly decided below and involves no conflict of decisions or important question of law. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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FEBRUARY, 1945.